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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

COLTON SCHMIDT, individually and on behalf of others similarly situated; REGGIE NORTHRUP, individually and on behalf of others similarly situated,

Plaintiffs,

v.

AAF PLAYERS, LLC, a Delaware Limited Liability Company, d/b/a/ The Alliance of American Football; THOMAS DUNDON, an individual; CHARLES "CHARLIE" EBERSOL, an individual; LEGENDARY FIELD EXHIBITIONS, LLC, a Delaware Limited Liability Company; AAF PROPERTIES, LLC, a Delaware Limited Liability Company; EBERSOL SPORTS MEDIA GROUP, INC., a Delaware Corporation; and DOES 1 through 200, inclusive,

Defendants.

Case No. 3:19-cv-03666-JCS

Hon. Joseph C. Spero

DEFENDANT'S NOTICE OF MOTION AND MOTION TO TRANSFER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: August 16, 2019
Time: 9:30 a.m.
Courtroom: G, 15th Floor

Action Filed: April 10, 2019
Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August , in Courtroom G, 15th Floor, of the above-captioned court, located 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Thomas Dundon will move to transfer venue pursuant to 28 U.S.C. §1412 or 28 U.S.C. § 1404(a).

Defendant Thomas Dundon, by his undersigned attorneys, respectfully requests that this Court enter an order dismissing Plaintiff's Complaint.[1] If not dismissed, Defendant respectfully requests that this case be transferred to the Western District of Texas pursuant to 28 U.S.C. § 1412 for referral to the bankruptcy court that is administering the bankruptcy cases filed by Dundon's co-Defendants because this case is related to those bankruptcy proceedings. Alternatively, the case should be transferred to the Northern District of Texas, which is where Dundon resides, pursuant to 28 U.S.C. §1404(a) for the convenience of the parties and witnesses and in the interest of justice.

This motion will be based upon this Notice of Motion and Motion to Dismiss, the Memorandum of Points and Authorities, the Declaration of Thomas Dundon, the Declaration of Alana K. Ackels, and on such other further evidence and argument as may be presented at the time of hearing on the motion.

[1] *See* Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, filed concurrently herewith.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Thomas Dundon ("Dundon"), an individual, does not have sufficient contacts with the State of California to support the exercise of personal jurisdiction over him in this case. (*See* Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, filed concurrently herewith.) Accordingly, Dundon respectfully asks this court to dismiss the present case against him.

Alternatively, the court should transfer this case to Texas. If not dismissed, this case should be transferred to the Western District of Texas pursuant to 28 U.S.C. §1412 for referral to the bankruptcy court that is administering the bankruptcies filed by Dundon's co-Defendants because this case is related to those bankruptcy proceedings. Alternatively, the case should be transferred to the Northern District of Texas pursuant to 28 U.S.S. §1404(a), which is where Dundon resides, for the convenience of the parties and witnesses and in the interest of justice.

II. FACTS

A. PROCEDURAL BACKGROUND.

On or about April 10, 2019, Plaintiffs filed an action titled *Colton Schmidt, individually and on behalf of others similarly situated; Reggie Northrup, individually and on behalf of others similarly situated v. AAF Players, LLC, a Delaware Limited Liability Company, d/b/a/ The Alliance of American Football; Thomas Dundon, an individual; Charles "Charlie" Ebersol, an individual; Legendary Field Exhibitions, LLC, A Delaware Limited Liability Company; AAF Properties, LLC, a Delaware Limited Liability Company; Ebersol Sports Media Group, Inc., a Delaware Corporation; and Does 1 through 200, inclusive*, in the Superior Court of the State of California, County of San Francisco, Case No. CGC-19-575169 (the "Players' Class Action"). (*See* Declaration of Alana K. Ackels ("Ackels Decl.") at , ¶ 3, Ex. A.)

On June 24, 2019, Defendant Thomas Dundon ("Dundon") filed *Defendant's Petition and Notice of Removal of Civil Action under 28 U.S.C. §§ 1332, 1441, 1446, 1453, 1711, et seq.; and 28 U.S.C. §§ 1334, 1452*, and removed the Players' Class Action to this Court. (*See* Doc. # 01.)

Concurrently with the filing of this motion, Dundon is filing a *Defendant's Motion to*

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Dismiss for Lack of Personal Jurisdiction. (*See* Doc. # 6.)

B. THIS CASE IS RELATED TO BANKRUPCTY CASES PENDING IN THE WESTERN DISTRICT OF TEXAS.

The class of plaintiffs in the Players' Class Action are persons who allegedly contracted with or were involved with the Alliance of American Football (the "League") as players. (*See* Compl., ¶ 12.) Plaintiffs' allegations in the Player's Class Action all arise from their involvement as players in the League. *Id*. Plaintiffs alleged that all players entered into the League's Standard Player's Agreement ("SPA"). (Compl., ¶¶ 23-25.) The SPA has a choice of law clause that states, "This SPA is made under and shall be governed by the laws of the State of Delaware." (Ackels Decl., ¶ 4, Ex. B.) The SPA further indicates that any dispute arising out of the SPA shall be governed by the Football Administration Manual, which suggests that mandatory binding arbitration may be the sole and exclusive forum to hear disputes.[2] (*Id*.)

Plaintiffs' claims arise from allegations that, *inter alia*, Defendants made misrepresentations to Plaintiffs about the long-term viability of the League, Defendants either breached or induced breach of Plaintiffs' contracts with the League, and the League failed to pay Plaintiffs' their wages. (*See* Compl., ¶¶ 15-46.)

All of the entity defendants in the Players' Class Action have filed for bankruptcy. The only defendants in the Players' Class Action that have not filed for bankruptcy are the individual defendants, Dundon and Ebersol.

There are six bankruptcy matters arising out of the League operations and closure, all of which have been filed in the Western District of Texas in San Antonio, Texas:

1. *In re Legendary Field Exhibitions, LLC*, No. 19-50900-CAG;
2. *In re AAF Players, LLC*, No. 19-50902-CAG;
3. *In re AAF Properties, LLC*, No. 19-50903-CAG;
4. *In re Ebersol Sports Media Group, Inc.*, No. 19-50904-CAG;
5. *In re LFE 2, LLC*, No. 19-50905-CAG; and
6. *In re We Are Realtime, LLC*, No. 19-50906-CAG.

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[2] If through discovery Dundon discovers that an arbitration agreement governs the players' claims, Dundon reserves the right to compel arbitration and seek dismissal of the present litigation.

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(*See* Ackels Decl., ¶¶ 5-7, Ex. C.) These six matters are collectively referred to herein as the "Bankruptcy Cases." The first four matters were filed by the entity Defendants in Plaintiffs' Players' Class Action (hereinafter referred to as the "Debtor/Defendant(s)"). (*Id.*) Bankruptcy Judge Craig A. Gargotta in San Antonio has already started administering the bankruptcy estates by addressing lift stay motions, addressing requested substantive consolidation of all of the six bankruptcy estates, addressing motions to sell assets, addressing motions to settle disputes with creditors, approving payments to brokers, and approving the retention of counsel by the Chapter 7 Trustee. (Ackels Decl., ¶¶ 8-9, Ex. D.)

Dundon has filed a claim in each of the six Bankruptcy Cases (the "Dundon Bankruptcy Claims"). (*See* Ackels Decl., ¶ 10, Ex. E.) The Dundon Bankruptcy Claims set out how Dundon (through Dundon Capital Partners LLC, or "DCP") was fraudulently induced by Ebersol Sports Media Group, Inc., Charles Ebersol, and the other Debtor/Defendants (collectively, the "AAF") to invest in the League. (*Id.*) Based on representations made by the AAF, DCP entered into a Binding Term Sheet for Series 2 Preferred Stock (the "Term Sheet") on February 14, 2019, wherein DCP agreed to make a maximum cumulative commitment of up to $70,000,000 in the League. (*Id.*) DCP honored its obligations under the Term Sheet, but later discovered that the AAF had made multiple misrepresentations to Dundon and DCP regarding the viability of the League and its authority. (*Id.*)

The Term Sheet has a forum selection clause that states:

> Each of the parties submits to the exclusive jurisdiction of any state or federal court sitting in the State of Texas, in Dallas, Texas, in any action or proceeding arising out of or relating to this Binding Term Sheet, agrees that all claims in respect of the action or proceeding may be heard and determined in any such court and agrees not to bring any action or proceeding arising out of or relating to this Binding Term Sheet in any other court.

(*See* Declaration of Thomas Dundon ("Dundon Decl."), ¶ 15.) Under the Term Sheet, Dundon had the right to become, and did become, a member of the board of directors of ESMG. (*Id.*, ¶ 12.) Through Dundon's position as a board member, he is entitled to indemnity from ESMG (one of the Debtors/Defendants) for any claims (including Plaintiffs' claims in this case) arising from his duties

as a board member or chairman of the board. (*Id*., ¶ 13, Ex. 1.)

C. DUNDON RESIDES IN TEXAS, SCHMIDT RESIDES IN CALIFORNIA, NORTHRUP RESIDES IN FLORIDA, THE PUTATIVE CLASS IN NATIONWIDE, AND ANTICIPATED EVIDENCE AND WITNESSES ARE PRIMARILY LOCATED IN TEXAS, GEORGIA, FLORIDA, AND CALIFORNIA.

Dundon is, and at all times relevant to the Complaint was, a resident of the County of Dallas, State of Texas. (*See* Dundon Decl. ¶ 2.) Plaintiff Colton Schmidt is a resident of the County of Los Angeles, State of California. (Compl., ¶1a.) Plaintiff Reggie Northrup is a resident of the County of Orange, State of Florida. (Compl., ¶1b.) The putative class is defined as "all persons who contracted with AAF Players, LLC or were involved with the Alliance of American Football as a player." (Compl., ¶¶ 12-13.) The League consisted of eight teams. (Compl., ¶ 20.) The eight teams were located in: Atlanta, Georgia; Birmingham, Alabama; Memphis, Tennessee; Orlando, Florida; Tempe, Arizona; Salt Lake City, Utah; San Antonio, Texas; and San Diego, California. (Dundon Decl., ¶ 16.)

The bankruptcy petitions filed by the Debtor/Defendants under penalty of perjury list the principal place of business for each of them as San Antonio, Texas. (*See* Ackels Decl., ¶ 6, Ex. C.) The bankruptcy schedules show that the Debtor/ Defendants have storage facilities in the following cities: San Francisco, California; San Antonio, Texas; Alpharetta, Georgia; Tampa, Florida; and Westborough, Massachusetts. (*Id*., ¶ 11, Ex. F.) The bankruptcy schedule filed by ESMG shows that its books and records were kept by accountants in San Francisco, California; Atlanta, Georgia; and Clearwater, Florida. (*See* Ackels Decl., ¶ 12, Ex. G.)

III. LEGAL AUTHORITIES AND ARGUMENT

A. THE CASE SHOULD BE TRANSFERRED TO BANKRUPTCY COURT IN THE WESTERN DISTRICT OF TEXAS.

Dundon seeks transfer of venue from this Court to the United States District Court for the Western District of Texas (San Antonio Division) pursuant to 28 U.S.C. § 1412; Dundon will then further seek referral to the United States Bankruptcy Court for the Western District of Texas (San

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Antonio Division) (the "Bankruptcy Court") pursuant to its Standing Order of Reference.[3] Dundon's burden under 28 U.S.C. § 1412 is to show that transfer of venue is appropriate by a preponderance of the evidence. *Gulf States Exploration Co. v. Manville Forest Products Corp. (In re Manville Forest Products Corp.),* 896 F.2d 1384, 1390 (2d Cir 1990).

Pursuant to 28 U.S.C. § 1412, "[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." Once a bankruptcy case is transferred under Section 1412, the transferee district court refers the case to the bankruptcy court for that district pursuant to a general order of reference. *In re Gugliuzza,* 852 F.3d 884, 890 (9th Cir. 2017); *Jackson v. Fenway Partners, LLC*, 2013 WL 1411223, *3 (N.D. Cal. Apr. 8, 2013) (noting that some courts apply Section 1404(a) but courts within the Northern District of California apply Section 1412).

Similar to the general federal transfer statute, "[t]he section 1412 statutory standards for transferring a bankruptcy case invoke the 'interest of justice' and 'convenience of the parties.'" *In re Donald,* 328 B.R. 192, 204 (B.A.P. 9th Cir. 2005). To consider the interest of justice and convenience of the parties, a court's analysis is "inherently factual and necessarily entails the exercise of discretion based on the totality of the circumstances." *Id.*

1) <u>The "Interests of Justice" Test</u>

The factors the Court should consider in determining whether a transfer is warranted under the 'interests of justice' prong of Section 1412 include:

1) the economics of estate administration;

2) the presumption in favor of the 'home court;'

3) judicial efficiency;

4) the ability to receive a fair trial;

5) the state's interest in having local controversies decided within its

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[3] As noted in Defendant's Notice of Removal (Doc. # 01), to the extent that any of the claims asserted by Plaintiffs are owned by the Debtor/Defendants pursuant to 11 U.S.C. 541 or arise through "derivative" liability, then those claims either "arise in" or "arise under" under Title 11 pursuant to 11 U.S.C. 1334, are claims that should be transferred to the bankruptcy court, and are claims about which the bankruptcy court may enter final orders.

borders by those familiar with its laws;

6) the enforceability of the judgment; and

7) the plaintiff's choice of forum, although this is tempered by the presumption in favor of the home court.

Jacobsen v. Bank of America Corp., No. C 10-03551 JSW, 2010 WL 11552987, at *2 (N.D. Cal., Nov. 1, 2010). This prong is to be analyzed under a "broad and flexible standard which must be applied on a case-by-case basis." *Senorx, Inc. v. Coudert Brothers, LLP*, No. C-07-1075 SC, 2007 WL 2470125, at *1 (C.D. Cal. 2007) (transferring case) (citing *In re Manville Forest Prods. Corp.,* 896 F.2d at 1391).

i. The Economics of Estate Administration Weighs in Favor of Transfer.

Estate administration is the most important of all of the factors. *Jacobsen,* 2010 WL 11552987 at *2; *see also Jackson,* 2013 WL 1411223 at *3.

It is clear that the Players' Class Action will have a significant impact on the administration of the Debtor/Defendants' Bankruptcy Cases. First, the allegations of Plaintiffs against the Debtor/Defendants in the Players' Class Action are strikingly similar to the claims asserted by Dundon in the Dundon Bankruptcy Claims. (*compare* Compl. *with* Ackels Dec., Ex. E.) Second, the outcome of the Players' Class Action will have a direct impact on the distributions made to other creditors of the Debtor/Defendants. Third, Dundon is owed indemnity by ESMG for any conduct arising out of his role as a director of ESMG, putting his alleged liability in the Players' Class Action squarely at issue in the administration of the ESMG bankruptcy estate.

As to the first point, the claims asserted by Plaintiffs against the Debtor/Defendants in the Players' Class Action are very similar to those asserted by Dundon and DCP against the Debtor/Defendants in the Bankruptcy Cases. The Plaintiffs assert that they were duped into playing for the League by the alleged misrepresentations of Ebersol, Dundon and the Debtor/Defendants concerning the financial viability of the League. (*See, e.g.*, Compl. ¶¶ 81-96.) Similarly, Dundon and DCP have filed claims against the Debtor/Defendants in the Bankruptcy Cases asserting that they were duped into investing $70,000,000 in the League by the misrepresentations of the

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Debtor/Defendants about the financial viability of the League.[4] (*See* Ackels Decl., ¶ 10, Ex. E.) In the absence of transfer, two very different courts will be deciding the same issues that are fundamental to claims asserted against the Debtor/Defendants. This presents a significant risk of inconsistent findings, which could be detrimental to Dundon, DCP, Plaintiffs, and the Debtor/Defendants and their creditors.

As to the second point, the risk associated with the Players' Class Action is significant to the Debtor/Defendants' Bankruptcy Cases. All four Debtor/ Defendants identify Plaintiff Schmidt as an unsecured creditor with a claim in an "unknown" amount arising from "litigation." (Ackels Decl., ¶ 13, Ex. H.) Thus, the liability against the Debtor/Defendants stemming from the Players' Class Action has a direct impact on the distributions made to other bankruptcy creditors. Another factor is the expense that the Chapter 7 Trustee will have to expend traveling to California in the absence of transfer. Requiring the Chapter 7 Trustee to defend the Plaintiffs' claims against the Debtor/Defendants in a distant forum will necessarily reduce the amounts available to pay the Debtor/Defendants' creditors in the bankruptcy cases. *Think3 Litigation Trust v. Zucarrello (In re Think3, Inc.),* 529 B.R. 147, 209 (Bankr. W.D. Tex. 2015).

As to the third point, Plaintiffs' claims against Dundon threaten to affect the Debtor/Defendants' bankruptcy estates by imposing indemnity obligations on them and, thereby, diluting payments to creditors. If Plaintiffs obtain a judgment against Dundon in the Players' Class Action, Dundon has indemnity rights against at least one of the Debtor/Defendants (ESMG) for the amount of the judgment. (*See* Dundon Decl., ¶¶ 12-13, Ex. 1.) Thus, an award to Plaintiffs against Dundon, if any, will in turn result in a claim for indemnity by Dundon against the Debtor/Defendants. Dundon has already asserted a claim in the Bankruptcy Cases against the Debtor/Defendants to enforce and preserve those indemnity obligations. (Ackels Decl. ¶ 10, Ex. E.)

Further, the Dundon Bankruptcy Claims are to recover DCP's lost investment of $70 million.

[4] The Debtor/Defendants have also made misrepresentations regarding the extent of DCP's investment in the League, which has exposed Dundon and DCP to additional threatened and actual litigation.

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The Dundon Bankruptcy Claims dwarf the scheduled claims of the Debtor/Defendants. For example, Legendary Field Exhibitions ("LFE"), one of the Debtor/Defendants, has scheduled secured claims of nearly $20 million and another $38.5 million in unsecured claims. (Ackels Decl., ¶ 14, Ex. I.) The other three Debtor/Defendants, AAF Players, LLC ("AAF Players"), AAF Properties, LLC ("AAF Properties"), and Ebersol Sports Media Group, Inc. ("ESMG"), scheduled $7 million in unsecured claims, which is included in the amounts asserted by LFE. (*Id.*) The universe of claims against all of the Debtor/Defendants is less than $60 million, whereas the Dundon Bankruptcy Claims, coupled with Dundon's indemnity rights, could exceed $70 million. (*See* Ackels Decl., ¶ 10, Ex. E; *see also* Dundon Decl., ¶¶ 12-13, Ex. 1.) The Plaintiffs' claims against Dundon threaten to affect the Debtor/Defendants' bankruptcy estates by imposing indemnity obligations on them and, thus, dilute payments to the Debtor/Defendants' creditors.

These facts are very similar to those in the recent case of *Gibbs v. Rees,* No. 3:17CV386, 2018 WL 1460705 (E.D. Va. Mar. 23, 2018). In *Gibbs*, the plaintiffs brought a class action lawsuit against several companies and their principal for usury and RICO. *Id.* at *3. When some of the defendant companies filed for bankruptcy in Texas, the principal filed a claim in their bankruptcies arising from their indemnity obligations and moved to transfer the class action lawsuit to Texas bankruptcy court asserting "related to" jurisdiction. *Id.* at *5. The *Gibbs* Court addressed the 'interests of justice' analysis explaining:

> First and most importantly, the economic and efficient administration of the bankruptcy estate—factor one—will be served by transferring this case to be consolidated with the Bankruptcy Case. Plaintiffs have filed a class action adversary proceeding against the Think Finance Defendants in the Bankruptcy Court based on many of the same alleged facts as the Plaintiffs' Complaint in this Court. Resolving the claims against Rees and GPL in this Court therefore would involve many of the same legal and factual determinations as will be necessary to resolve Plaintiffs' claims against the Think Finance Defendants in the Bankruptcy Court. And, given the indemnification agreements that Rees and GPL both have with Think Finance, which require certain of the Think Finance Defendants to indemnify Rees and GPL for the costs of litigation, litigating the same facts and legal contentions in this Court and in the Bankruptcy Court will result in duplicative legal costs, which would be paid from the bankruptcy estate. Moreover, if the Court

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> kept this action here, Rees and GPL would need to litigate the substance of Plaintiffs' claims in this Court and separately litigate the issue of indemnification in Bankruptcy Court, also resulting in duplicative legal costs that would be paid from the bankruptcy estate. Accordingly, transferring this case so that it may be tried together with the similar claims in the Bankruptcy Court will promote the economic and efficient administration of the bankruptcy estate.

Id. at *14 (concluding that the facts "decidedly favor" transfer of venue). This factor weighs heavily in favor of transfer.

ii. Judicial Economy Weighs in Favor of Transfer.

Judicial economy is often considered along with the concern for efficient administration and, as such, is equally important. *Enron Corp. v. Arora (In re Enron Corp.)*, 317 BR 629, 640 (Bankr. S.D.N.Y. 2004) ("'economic administration … is necessarily tied to concerns of judicial economy"). The Western District of Texas Bankruptcy Court has explained that judicial economy involves:

> [T]he home court's familiarity with the substantive issues and familiarity with the law to be applied in the proceeding (i.e., "the learning curve"); the case load of the respective courts and thus whether the time to trial is shorter or substantially longer in one forum as opposed to the other; the respective availability of the courts for resolving discovery disputes and for moving the case toward trial at a reasonable pace given the issues involved.

In re Think3, Inc., 529 B.R. at 209 (citing *A.B. Real Estate, Inc. v. Bruno's, Inc. (In re Bruno's, Inc.),* 227 B.R. 311, 327-28 (Bankr. N.D. Ala. 1998)).

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Bankruptcy Judge Gargotta in San Antonio has already begun administering the bankruptcy estate by addressing lift stay motions, addressing requested substantive consolidation of all of the six bankruptcy estates, addressing motions to sell assets, addressing motions to settle disputes with creditors, approving payments to brokers, and approving the retention of counsel by the Chapter 7 Trustee. (Ackels Decl. ¶¶ 8-9, Ex. D.) Regardless of this transfer, the Bankruptcy Court will necessarily have to delve into the issues presented by Dundon's Bankruptcy Claims in the course of claims administration. As described *supra*, Dundon's Bankruptcy Claims are strikingly similar to Plaintiffs' claims in the Players' Class Action. It is wasteful for this Court to educate itself on these

same issues when Judge Gargotta already has the benefit of the 'learning curve' because of his familiarity with this case. Judicial economy would be promoted by hearing them both in the single forum of the Bankruptcy Court.

Similarly, significant discovery can be expected in both cases surrounding the same issues (*e.g.*, DCP's investment, the representations made by the Debtor/Defendants, Ebersol and Dundon, the operation of the league and other issues common to both cases and calling for the same proof). Discovery that overlaps among related cases should be coordinated by a single judge rather than proceed in a piecemeal fashion. *Enron Corp. v. Dynegy Inc. (In re Enron Corp.),* No. 01-16034, 2002 WL 32153911, *6 (Bankr. S.D.N.Y. Apr. 12, 2002).

Finally, cases being filed now in the Bankruptcy Court are being set for trial in roughly six months, whereas the Northern District of California is setting cases for trial in roughly sixteen months. Trial should be more expeditious in the Bankruptcy Court. This factor weighs in favor of transfer.

iii. The Presumption In Favor of the Home Court Weighs in Favor of Transfer.

Cases in this and most jurisdictions invoke a presumption that matters related to the bankruptcy cases be transferred to that 'home' bankruptcy court. *See.,e.g., Senorx, Inc.,* 2007 WL 2470125, at *1. "We are most reluctant to allow pieces to be severed from a case, requiring litigation in several jurisdictions, rather than the desired goal of 'centering' administration of an entire case in one jurisdiction." *In re 1606 New Hampshire Ave., Assoc.,* 85 B.R. 298, 305 (Bankr. E.D. Pa. 1988). "[I]n the interest of justice analysis, the interest of the bankruptcy estate, as opposed to the litigant's interest, is paramount." *Goodall v. Chrysler, Inc.,* No. 3:16-cv-03228, 2017 WL 4076093, *11 (C.D. Ill. Sept. 14, 2017) (contrasting typical deference given to plaintiff's choice of forum). This rationale is "based on the rationale that it is preferable for the court that has jurisdiction over the bankruptcy case to adjudicate adversary proceedings relating to the bankruptcy case." *In re Think3, Inc.,* 529 B.R. at 209; *see also Walker v. Directory Distribution Associates, Inc. (In re Directory Distribution Associates, Inc.),* 566 B.R 869, 880 (Bankr. S.D. Tex. 2017) (holding that 'home court' presumption applies even in 'related to' matters).

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As set forth more fully in Section III of Defendant's Petition and Notice of Removal (Doc. # 01), the Players' Class Action is inextricably intertwined with the Bankruptcy Cases and Dundon's Bankruptcy Claims. These matters should all be centered in the same home court rather than litigated in separate courts across the country. This factor weighs in favor of transfer.

iv. The Ability To Receive A Fair Trial Is Neutral.

There is no evidence that this factor weighs for or against transfer. This factor is neutral.

v. The States' Interest In Having Local Controversies Decided Within Its Borders By Those Familiar With Its Laws Is Neutral.

Plaintiffs may argue that the 'local controversies' factor weighs against transfer because Schmidt is a California resident asserting claims under California law on behalf of the purported class of players. However, the fact that the Plaintiffs have not limited their proposed classes to persons who worked in California weighs in favor of transfer. *Jackson,* 2013 WL 1411223, at *3. The League operated teams in eight different cities (Atlanta, Georgia; Birmingham, Alabama; Memphis, Tennessee; Orlando, Florida; Tempe, Arizona; Salt Lake City, Utah; San Antonio, Texas; and San Diego, California) and seven of those were in states other than California. (*See* Dundon Decl. ¶ 16.) The Complaint states that "[a]ll players of these teams are members of the Class." (Compl. ¶ 13(a).) Therefore, is not plausible to argue that the 'controversies' concerning this national league with only one team in California is 'local' in nature.

Additionally, the fact that Plaintiffs assert claims under California law should not weigh against transfer because federal courts "routinely apply the law of other jurisdictions." *In re Enron Corp.,* 2002 WL 32153911, at *7 (finding that little deference is given to the presence of another state's laws); *In re Think3, Inc.,* 529 B.R. at 210 (noting that Texas bankruptcy courts are often called upon to decide issues involving laws of other states). In fact, the SPA executed by each player (according to the Complaint) contains a choice of law clause making Delaware law applicable to disputes arising out of the contracts. (Ackels Decl., ¶ 4, Ex. B.) A California federal court is no more qualified to apply Delaware law than a Texas federal court. This factor is neutral.

vi. The Enforceability of the Judgment Is Neutral.

There is no evidence that a judgment rendered in one court would be more or less enforceable

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than a judgment rendered in the other. This factor is neutral.

vii. The Plaintiff's Original Choice of Forum Does Not Tip The Balance in Favor of Transfer.

The Plaintiff's choice of forum is only "viewed as a means to tip the balance against a transfer of venue [when] the moving party has failed to satisfy his or her burden of proof" to show that transfer is appropriate in the interest of justice. *Kaiser Group Holdings, Inc. v. Squire Sanders & Dempsey (In re Kaiser Group International, Inc.),* 421 B.R. 1, 21-22 (Bankr. D.D.C. 2009). In the seminal case of *Bruno's*, the court explained that this factor is last in the order of the 'interest of justice' factors because this factor can tip the balance in favor of not transferring venue only if the movant has not convinced the court to transfer the case by any of the preceding factors. *See In re Bruno's,* 227 B.R. at 328-29. This factor should not weigh into the Court's analysis because Dundon has shown that transfer to bankruptcy court is appropriate under the preceding factors.

2) <u>The "Convenience Of The Parties" Test.</u>

The Court must also consider the convenience of the parties, even where a transfer is in the interests of justice, and must consider the following factors:

1) the location of the plaintiff and defendant;

2) the ease of access to necessary proof;

3) the availability of subpoena power for unwilling witnesses; and

4) the expenses related to obtaining witnesses.

Jacobsen, 2010 WL 11552987, at *3.

i. The Location of the Plaintiffs and the Defendants Weigh In Favor of Transfer.

Here, the two named Plaintiffs reside in California and Florida, respectively. (Compl. ¶¶ 1(a)-(b).) Texas is centrally located between Florida and California. Additionally, the putative class is open to residents of any state so the class of plaintiffs may come from any state (including Texas). Five of the eight teams in the League were generally closer to Texas (Atlanta, Georgia; Birmingham, Alabama; Memphis, Tennessee; Orlando Florida; San Antonio, Texas) than to California (San Diego, California; Tempe, Arizona; Salt Lake City, Utah). It is reasonable to presume that the

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putative class members will be located closer to Texas or, at least, that Texas is more centrally located than California.

Dundon is a resident of Texas. (Dundon Dec. ¶ 2.) Ebersol is allegedly a resident of California. (Compl. ¶ 2(c).)

Plaintiffs alleged that the "principal place of business" of AAF Players, AAF Properties, and LFE is San Francisco while the "principal place of business" of ESMG is Los Angeles. (Compl. ¶ 2.) This is not accurate. **The voluntary bankruptcy petitions of all four Debtor/Defendants, which are sworn to under oath and with penalty of perjury, show that the mailing addresses, the principal places of business and the principal places of their assets are in San Antonio, Texas.** (Ackels Decl., ¶¶ 5-7, Ex. C.) Other schedules filed in the bankruptcy case by the Debtor/Defendants under oath state that the Debtors had a "central storage facility" in San Antonio. (*Id*., ¶ 15, Ex. J.) The Statement of Financial Affairs filed by ESMG shows that, while the Debtor/Defendants had one storage facility in San Francisco for "technology assets and office equipment," it had additional storage facilities in San Antonio, Texas; Alpharetta, Georgia; Tampa, Florida; and Westborough, Massachusetts for other assets. (Ackels Decl., ¶ 11, Ex. F.) In a class action where the focus is on corporate decision-making, the case should be heard in the corporate 'nerve center,' which is San Antonio in this case. *Dunlap v. Friedman's, Inc.,* 331 B.R. 674, 681 (S.D.W.V. 2005).

The evidence before the court is that the only persons involved in this case that reside in California are Plaintiff Schmidt and Defendant Ebersol, whereas: a) the other named Plaintiff is located in Florida; b) the remaining putative class presumably resides across the country; c) five of the six Defendants maintain their principal places of business (or "nerve centers") in Texas; and d) the four bankruptcy cases of the Debtor/Defendants are pending in Texas. This factor weights in favor of transfer.

ii. The Ease of Access to Necessary Proof Weighs In Favor of Transfer.

Plaintiffs' claims center around alleged misrepresentations made by Ebersol (in California), Dundon (in Texas), and other Debtor/ Defendants (in Texas) and Plaintiffs' alleged reliance on those misrepresentations (in California, Florida, and other unknown states across the country). (*See, e.g.*,

Compl. ¶¶ 81-96.) Texas is centrally located geographically so deposition testimony of all of the parties is more easily obtained in Texas.

To the extent that the parties need access to Debtor/ Defendants' physical assets, ESMG's bankruptcy schedules show that the Debtor/ Defendant have storage facilities in the following cities: San Francisco, California; San Antonio, Texas; Alpharetta, Georgia; Tampa, Florida; and Westborough, Massachusetts. (Ackels Decl., ¶ 11, Ex. F.) Other than the one facility located in San Francisco, all of the other storage facilities are located in or closer to Texas. If books and records are needed, ESMG's bankruptcy schedules show that its books and records were kept by accountants in San Francisco, California; Atlanta, Georgia; and Clearwater, Florida. (*Id*., ¶ 12, Ex. G.) Again, Texas is more centrally located for ease of access to this proof. This factor weighs in favor of transfer.

iii. The Availability of Subpoena Power For Unwilling Witnesses Is Neutral.

Dundon anticipates that he will seek testimony from the parties. As parties to the litigation, the need for subpoena power is not anticipated at this time. This factor is neutral.

iv. The Ease of Obtaining Witnesses at Trial Weighs In Favor of Transfer.

Sometimes stated as the 'convenience of witnesses' factor, this is one of the most important factors. As explained by the District Court for the Eastern District of Texas:

> In analyzing the cost of attendance of willing witnesses, courts consider the convenience of both party and non-party witnesses. Nevertheless, the convenience to non-party witnesses is afforded greater weight than that of party witnesses…When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.

Adaptix, Inc. v. HTC Corp., 937 F.Supp.2d 867, 875 (E. D. Tex. 2013) (internal quotations omitted); *In re Directory Distributing Associates, Inc.,* 566 B.R. at 883-84 (applying 100-mile test to analysis of transfer under section 1412). Here, the San Francisco State Court is 1,731 miles from the Texas Bankruptcy Court so the 100-mile rule is applicable.

The most important non-party witnesses in this case are those who can testify about, *inter*

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alia, the alleged statements made by Dundon and the League, Plaintiffs' alleged reliance on those statements, and those who can testify about the financial condition of the Debtors/ Defendants. These individuals will be located primarily in Texas or in areas to which Texas is more centrally located than California.

Witnesses who can testify regarding the books and records of the Debtor/Defendants will also be critical. ESMG's bookkeeper in Atlanta (*See* Ackels Decl., Ex. G) is located 2,476 miles from San Francisco but only 988 miles to San Antonio. The bookkeeper in Clearwater, Florida (*Id.*) is located 2,926 miles from San Francisco but only 1,198 miles from San Antonio. In contrast, the bookkeeper in San Francisco (*Id.*) would only have to travel 1,731 miles to San Antonio.

On balance, San Antonio is more convenient to non-party witnesses as a whole. This factor weighs in favor of transfer.

3) In conclusion, if not dismissed for lack of personal jurisdiction, the case should be transferred to the Western District of Texas, Bankruptcy Division.

Dundon has met his burden to show that transfer of this 'related to' case is appropriate under Section 1414. He has demonstrated that majority of the 'interest of justice' and the "convenience of the parties" factors weigh in favor of transfer. Therefore, the case should be transferred to the U.S. District Court for the Western District of Texas for referral to the U.S. Bankruptcy Court for the Western District of Texas.

B. ALTERNATIVELY, THE COURT SHOULD TRANSFER THE CASE TO THE NORTHERN DISTRICT OF TEXAS PURSUANT TO 28 U.S.C. § 1404(A) FOR THE CONVENIENCE OF PARTIES AND WITNESSES AND IN THE INTEREST OF JUSTICE.

A district court may transfer a civil action to any other district or division where it may have been brought "[f]or the convenience of parties and witnesses [and] in the interest of justice." 28 U.S.C. § 1404(a). The purpose of section 1404(a) "is to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Kohli v. McKesson Corp.*, No. C 13-03199 CRB, 2013 WL 5733721, at *2 (N.D. Cal., Oct. 22, 2013) (quoting *Van Dusen v. Barrack,* 376 U.S. 612, 616 (1964)) (internal quotations

omitted).

"Courts considering transfer must engage in a two-step analysis. First, courts determine whether the action could have been brought in the target district. Second, courts undertake an individualized, case-by-case consideration of convenience and fairness." *Emerson v. Toyota Motor N. Am., Inc.*, No. 14-CV-02842-JST 2014 WL 6985183, at *1 (N.D. Cal. Dec. 9, 2014) (citation and quotation marks omitted). In this case, the outcome of both steps weighs in favor of transfer to Texas.

1) Plaintiffs could have brought this lawsuit in the Northern District of Texas.

Litigants may bring civil actions in "(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." 28 U.S.C. § 1391(b)(1)-(3). A natural person is deemed to reside in the judicial district where the person is domiciled. *Id.* § 1391(c)(1).

Dundon resides in Dallas, Texas, which is located in the Northern District of Texas. (See Dundon Dec. ¶ 2.) Therefore, venue is proper and the case could have been brought in the Northern District of Texas.

2) Convenience and the Interest of Justice Favor Transfer to the Northern District of Texas.

For the second prong of the analysis, the court weighs the convenience of parties and witnesses and the interest of justice. *Van Dusen*, 376 U.S. at 616. The Ninth Circuit has set forth nine factors to consider to determine whether a case should be transferred pursuant to 28 U.S.C. § 1404(a). Those factors are:

(1) the location where the relevant agreements were negotiated and executed;

(2) the state that is most familiar with the governing law;

(3) the plaintiff's choice of forum;

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(4) the respective parties' contacts with the forum;

(5) the contacts relating to the plaintiff's cause of action in the chosen forum;

(6) the differences in the cost of litigation in the two forums;

(7) the availability of compulsory process to compel attendance of unwilling non-party witnesses;

(8) the ease of access to sources of proof; and

(9) the presence of a forum selection clause.

Jones v. GNC Franchising, Inc., 211 F.3d 495, 498–99 (9th Cir. 2000). When these factors are analyzed, both individually and collectively, they weigh heavily in favor of transferring this case to the Northern District of Texas.

i. The location where the relevant agreements were negotiated and executed.

When a national class action is alleged, the place of execution of particular agreements is only marginally relevant. *Harms v. Experian Info. Solutions, Inc.*, No. C 07-0697 JF, 2007 WL 1430085, at *2 (N.D. Cal., May 14, 2007). Here, the SPAs were entered into by Defendant AAF Players, LLC, which is located in Texas (Ackels Decl., Ex. C.), and the players, who reside across the country (Compl., ¶¶ 12-13). At best, this factor is neutral.

ii. The state that is most familiar with the governing law.

As outlined above, this factor is neutral, as any federal court is capable of applying California or Delaware state law. As this Court has recognized:

> "a number of courts have held that [f]ederal courts have an equal ability to address claims arising out of state law. District courts regularly apply the law of states other than the forum state, thus this factor is to be accorded little weight . . . because federal courts are deemed capable of applying the substantive law of other states."

Rabinowitz v. Samsung Electronics America, Inc., No. 14-CV-00801-JCS, 2014 WL 5422576, at *7 (N.D. Cal. Oct. 10, 2014) (citations and internal quotation marks omitted). This factor is neutral.

iii. Plaintiff's choice of forum.

A plaintiff's choice of forum is given less weight when the plaintiff purports to represent a class. *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (affirming transfer of venue). Indeed, a

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plaintiff's choice of forum in a nationwide class action is "considerably weakened." *Koster v. (American) Lumbermens Mut. Cas. Co*., 330 U.S. 518, 524 (1947).

Here, Plaintiffs – one from California and one from Florida – purport to represent a nationwide class with respect to their claims. (Compl. ¶ 12.) Numerous courts have refused to defer to a plaintiff's choice of forum under these circumstances. *See Lopez v. BeavEx, Inc.*, No. C 15-00550 JSW, 2015 WL 2437907, at *2 (N.D. Cal., May 20, 2015) (holding that "Plaintiff's choice of forum is not entitled to much deference" in FCRA nationwide class action); *Stone v. U.S. Sec. Assoc., Inc.*, No. 15-CV-00235-JST, 2015 WL 2438029, at *3 (N.D. Cal., May 21, 2015) (holding that when a plaintiff acts as a representative of a nationwide class action rather than a statewide class action, then the plaintiff's choice of forum is entitled to only minimal consideration); *Smith v. HireRight Solutions, Inc.*, No. CIV.A. 09-6007, 2010 WL 2270541, at *3-4 (E.D. Pa., June 7, 2010) (holding that because plaintiff's case was brought as a nationwide class action, then plaintiff's choice of forum was not entitled to considerable deference); *Emerson,*2014 WL 6985183, at *2. If there is an expectation that there will be more plaintiffs residing outside of the forum state than inside the forum state, the court may disregard the plaintiffs' choice of forum all together. *Id*.; *see also Harms*, 2007 WL 1430085, at *1 ("[T]he court may disregard the plaintiff's choice of forum where the plaintiff's suit is the result of forum-shopping.").

Additionally, a plaintiff's choice of forum is afforded substantially less deference where the plaintiff is not a resident of the forum. *In re Apple, Inc.*, 602 F.3d 909, 913 (8th Cir. 2010); *Avritt v. Reliastar Life Ins. Co.*, No. C06-1435RSM, 2007 WL 666606, at *2 (W.D. Wash., Feb. 27, 2007) ("the deference due plaintiff's choice is greatly reduced where plaintiff does not reside in the forum"); *Barham v. UBS Financial Services*, 496 F.Supp.2d 174, 178 (D.D.C. 2007) ("courts afford 'substantially less deference' to plaintiff's choice of forum when the plaintiff is not a resident of that forum"); *Huggins v. Stryker Corp.*, 932 F.Supp.2d 972, 981 (D. Minn. 2013) (plaintiff's choice of forum "is entitled to less deference when the plaintiff is not a resident of the selected forum and when the underlying events giving rise to the action occurred outside the forum").

Here, while Schmidt is a resident of California, Northrup is a resident of Florida. (Compl., ¶¶ 1(a)-(b).) Further, Plaintiffs claim to represent all players of the League. (Compl., ¶ 12.) The

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League was comprised of eight teams, which were based in Texas, Georgia, Alabama, Tennessee, Florida, Arizona, and Utah, with only one team based in California (San Diego). (Dundon Decl., ¶ 16.)

In light of the fact that Plaintiffs seek to represent a nationwide class, and that Northrup is not a California resident, Plaintiffs' choice of forum is not entitled to deference. *Lopez*, 2015 WL 2437907, at *2 (transferring FCRA class action from Northern District of California to Northern District of Georgia despite plaintiff's residence in California); *Harms,* 2007 WL 1430085, at *2 (transferring case from Northern District of California to Central District of California despite plaintiffs' residence in chosen district); *Emerson*, 2014 WL 6985183, at *2 (transferring case from Northern District of California to Central District of California despite plaintiffs' residence in chosen district).

This factor weighs in favor of transfer to the Northern District of Texas.

iv. The respective parties' contacts with the forum.

As outlined *supra*, Dundon resides in the Northern District of Texas, all four Debtor/Defendants reside in Texas, and the putative class presumably resides across the country. On balance, this factor weighs in favor of transfer to Texas.

v. The contacts relating to the plaintiff's cause of action in the chosen forum.

Plaintiffs' claims against Dundon stem from alleged misrepresentations made in connection with his investment in the League. (*See, e.g.*, Compl., ¶¶ 30-37.) The negotiations handled by Dundon in connection with DCP's $70 million investment in the League were largely conducted from his home in Dallas, Texas. (Dundon Decl., ¶¶ 10-11.) In addition, his investment is memorialized in the Term Sheet, which states that Dallas, Texas is the selected venue for any disputes arising from same. (Dundon Decl., ¶ 15.) The operative facts and conduct surrounding Dundon's investment in the League, which is the central issue in the Players' Class Action, occurred in the Northern District of Texas. This factor weighs in favor of transfer.

vi. The differences in the cost of litigation in the two forums.

Because the majority of the witnesses who may testify at a hearing or trial in this case are

located closer to Texas and key evidence is located closer to Texas (*see* Section III.A.2, *supra*), significant travel costs would be saved by transferring the case to the Northern District of Texas. This factor weighs in favor of transfer.

vii. The availability of compulsory process to compel attendance of unwilling non-party witnesses.

Dundon is not presently aware of any critical non-party witnesses. Accordingly, this factor is neutral.

viii. The ease of access to sources of proof.

As set out in Section III.A.2, *supra*, the anticipated evidence in this case is located in or closer to Texas than California. Because the majority of evidence relevant to this case is concentrated in or near Texas, this factor weighs in favor of transferring the case. *See Lopez*, 2015 WL 2437907, at *2-3 (transferring case to forum where defendants' witnesses and documents were located and holding that "because Plaintiff is bringing this case as a nation-wide class action and he is not seeking any individual damages, his role is likely to be minimal").

ix. The presence of a forum-selection clause.

A forum-selection clause may be enforced by a motion to transfer under Section 1404(a). *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 59 (2013). Forum selection clauses are presumptively valid in actions arising out of a contract, and they can be enforced against nonparties, "where the alleged conduct of the nonparties is closely related to the contractual relations" such that the nonparties can be considered "transaction participants" intended to "benefit from and be subject to" the forum selection clause. *See Lewis v. Liberty Mutual Insurance Company* 321 F.Supp.3d 1076, 1081 (N.D. Cal. 2018).

In this case, the Term Sheet memorializing Dundon's investment in the League contains a forum-selection clause making state or federal court in Dallas, Texas the mandatory venue for any dispute "arising out of or relating to" the Term Sheet. (Dundon Decl., ¶ 15.) This factor weighs in favor of transferring the case to the Northern District of Texas.

x. Other considerations.

The court may also consider the relative court congestion and time of trial in each forum.

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VidAngel LLC v. ClearPlay Inc., No. C 13-5989 SI, 2014 WL 894524, at *3 (N.D. Cal., Mar. 4, 2014); *Williams v. Bowman*, 157 F.Supp.2d 1103, 1106 (N.D. Cal. 2001); *see also Jones*, 211 F.3d at 498–99.

According to the most recent statistics published by the U.S. Courts, the number of total pending cases before the Northern District of California is 5,063, whereas the total number of pending cases before the Northern District of Texas is only 3,082. *See Federal Judicial Caseload Statistics 2018 Tables*, https://www.uscourts.gov/federal-judicial-caseload-statistics-2018-tables (last accessed July 1, 2019).[5] In addition, the median time interval from filing to trial of civil cases was over 24 months in the Northern District of California, as compared to 22 months in the Northern District of Texas. *See id.* Thus, the relative congestion and time to disposition in the two districts weighs slightly in favor of transfer. *See Lopez*, 2015 WL 2437907, at *3 (holding that heavy caseload of Northern District of California relative to target forum "weighs slightly in favor of transfer"); *Smith*, 2010 WL 2270541, at *9 (holding that relatively lighter caseload of target forum "weights slightly in favor of transfer").

xi. Convenience and Interest of Justice Factors Weigh In Favor of Transfer to the Northern District of Texas.

Analyzing the factors collectively shows that of the nine factors, six of the factors weigh in favor of transfer while the other three factors are neutral. The majority of witnesses and documents are located in Texas, the majority of relevant conduct occurred in Texas, and there is a forum-selection clause making the Northern District of Texas the chosen forum for disputes arising out of the Term Sheet. Accordingly, these factors strongly favor transferring venue to Texas and, specifically the Northern District of Texas.

[5] Dundon requests that the Court take judicial notice of this information pursuant to Federal Rule of Evidence 201. *See Stone*, 2015 WL 2438029, at *2 (granting request for judicial notice of caseload statistics).

IV. CONCLUSION

For the foregoing reasons, if the Court does not grant Defendant's Motion to Dismiss for Lack of Personal Jurisdiction (Doc. # 6), Defendant Thomas Dundon respectfully requests that the Court transfer the case to the U.S. District Court for the Western District of Texas for referral to the U.S. Bankruptcy Court for the Western District of Texas or, alternatively, to the Northern District of Texas.

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